STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-208

December 9, 1998

CTC COMMUNICATIONS, CORP.
Request for Commission Investigation Into Unlawful and Unjust Practices and for an Award of Civil Damages and Civil and Criminal Penalties Against Bell Atlantic-Maine

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **Monday, January 4, 1999 at Noon**. Because of Commissioner and staff schedules, it is expected that the Commission will not consider this Report until its Deliberative Session on **January 11, 1999.**

I. SUMMARY OF DECISION

CTC has requested the Commission to rule that Bell Atlantic customers who are subject to "termination provisions" under contractual arrangements with Bell Atlantic may assign those contracts to CTC without enforcement of the termination provisions. For the reasons described in this Order, we deny CTC's request.

II. INTRODUCTION

On March 18, 1998 CTC Communications, Corp. (CTC) filed a complaint pursuant to 35-A M.R.S.A. § 1302(3).[1] The Complaint requested the Commission to rule that certain

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[1]Section 1302(3) states:

> **Complaint by utility or commission.** The commission may institute or any public utility may take complaint as to any matter affecting its own product, service or charges. The complaint shall

retail customers of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Maine (BA-ME) have the right to assign their contractual rights to CTC. The retail customers in question have contracts with Bell Atlantic (or are subject to contractual rights and obligations pursuant to BA-ME's rate schedule) that impose term and/or volume commitments on the customer in exchange for discounts from prices that are available if a customer does not make a term or volume commitment. Under those contractual arrangements, if a customer terminates service prior to the term required in the contract or rate schedule, or the customer does not meet the volume commitments, termination liability provisions apply that require the customer to compensate Bell Atlantic for the approximate difference between the amount the customer would have paid without the discount or volume commitment. CTC argues that when a retail customer assigns its contractual rights to CTC, the Commission should find that the assignment does not constitute termination and rule that Bell Atlantic may not enforce its termination liability provisions. CTC asserts three grounds in support of its request, all discussed below.

In our Order Addressing Jurisdictional Issues, issued on May 18, 1998, we decided that we did not need to rule on whether we had jurisdiction under 35-A M.R.S.A. § 1302(3), but instead decided that we would consider this case pursuant to our own authority to investigate any matter pursuant to 35-A M.R.S.A. § 1303. We also ruled that we had jurisdiction to consider the portion of CTC's claim that it raised under the Telecommunications Act of 1996 ("TelAct"; 47 U.S.C. § 251 et seq.). Finally, the May 18 Order also described the scope and limits of this investigation. In particular, we do not in

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be processed in accordance with subsection 2.

this proceeding consider the merits of arguments that we should rule that Bell Atlantic's terminations liability provisions are invalid. We are considering that issue in *Maine Public Utilities Commission, Inquiry into Whether Incumbent Local Exchange Carriers Should be Required to Provide their Customers with an Opportunity to Terminate Special Contracts, Pursuant to Request for Rulemaking by Freedom Ring Limited Liability Company,* Docket No. 96-699.

III. FACTUAL BACKGROUND AND SUMMARY OF LEGAL ARGUMENTS

CTC is a telephone utility in the State of Maine and has authority from the Commission, pursuant to 35-A M.R.S.A. § 2102, to provide intrastate local and interexchange telephone service. Its authority to serve was granted on December 22, 1997 (interexchange) and January 20, 1998 (local). Prior to obtaining that authority, CTC was a sales agent for New England Telephone and Telegraph Company (NET), both when NET was doing business as NYNEX, and, later, as BA-ME.[2] About the same time that it became a telephone utility in December of 1997, CTC terminated its sales agency agreement with BA-ME. On December 1, 1997, CTC entered into a standard Interim Resale Agreement with Bell Atlantic-Maine (BA-ME). Under that agreement, BA-ME "will offer telecommunications services it provides at retail to end users in the State of Maine for resale by the Customer [CTC] in accordance with the attached Terms and Conditions - Resale Services . . . ."

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[2]A merger between Bell Atlantic Corporation and NYNEX (at the parent level) became effective on August 14, 1997. The subsidiary public utility corporation, New England Telephone and Telegraph Company, continues to exist without change except for the name under which it does business.

Bell Atlantic is also a telephone utility in Maine, having authority pursuant to P. & S.L. 1885, ch. 513. It provides local and interexchange telecommunications services to retail business and residential customers and to wholesale customers. Bell Atlantic sells service to retail customers pursuant to its schedule of rates and terms and conditions (tariff) and special contracts. Under the TelAct it is classified as an incumbent local exchange carrier (ILEC); that status imposes "additional obligations" under 47 U.S.C. § 251(c), beyond those applicable to all "telecommunications carriers" (§ 251(a)) and to "all local exchange carriers" (§ 251(b)). Among the obligations under section 251(c) is one at issue in this case, the duty of ILECs to "offer for resale . . . any telecommunication that the carrier provides at retail to subscribers who are not telecommunication carriers."

For some of its tariffed and special contract retail services Bell Atlantic offers discounts in exchange for commitments by retail customers that they will maintain specified calling volumes (volume commitments) or that they will subscribe to the service for a specified period of time (term commitments), or both. Generally, larger discounts apply to greater volumes and to longer term commitments. If a customer does not meet the volume commitments, or if the customer decides to terminate the service prior to the end of its term commitment, it is subject to a "termination liability provision." A termination liability provision requires a customer to compensate BA-ME for the approximate difference between the discount the customer would have received if it had contracted for a lesser volume or a shorter term commitment and the discount under the original contracted arrangement. Termination liability provisions are typically pro-rated if, for example, a customer who has fulfilled a major portion of a term commitment will pay a lesser penalty than one who has fulfilled only a small portion.

CTC claims that the Commission should rule that the retail customers of Bell Atlantic who are subject to termination clauses have the right to assign their contractual obligations (whether they arise under a special contract or pursuant to tariff) to CTC without enforcement of the termination liability provisions, and that such assignments do not constitute a termination of the customer's service from BA-ME.[3] After such an assignment, CTC would become Bell Atlantic's wholesale customer. In turn, CTC would sell the contractual rights and obligations to the former BA-ME retail customer.

CTC bases its claim on three grounds. First, CTC claims that it is a reseller of retail services because, after the assignment, CTC would be a wholesale purchaser which would then sell the service to a retail customer. CTC argues that the TelAct requires such resale, that it prohibits unreasonable restrictions on resale, and that enforcement by BA-ME of its termination provisions against its retail customers, if they assign contracts to wholesale customers, would be an unreasonable restriction.

Second, CTC claims the Resale Agreement between it and Bell Atlantic "expressly anticipates" such an assignment from BA-ME's retail customers to reseller such as CTC.

Third, CTC claims that such an assignment is permitted under general contract law, as reflected in the Restatement (Second) of Contracts § 317, published by the American Law Institute. Contract law generally allows a party to a contract to assign its rights, but there are important exceptions to that rule, including the fact that a contract itself may prohibit an assignment. Bell Atlantic's tariff and contracts contain provisions that address the right of

[3] The general terms "contractual obligation," "contractual arrangement" and "contract" will be used to describe the discount and termination provision pricing methodology that occur both under BA-ME's tariff and in special contracts. While under the tariff there might not be a written contract between BA-ME and its retail customer, nevertheless a contract exists and both parties have contractual rights and obligations.

retail customers to assign their contracts. CTC argues, however, that those provisions apply only to assignments to other retail customers. It also argues that no other recognized exceptions to the general rule of assignability prohibits the proposed assignment in this case. As discussed above, CTC's first ground arises under federal law (the TelAct). Its other grounds are under state law. CTC apparently claims that the refusal of Bell Atlantic to recognize the second and third grounds is an "unreasonable act or practice" that is prohibited by 35-A M.R.S.A. § 1303.

Bell Atlantic claims it is entitled to enforce, and presently does enforce, the termination provisions of the contractual arrangements with its retail customers whenever a retail customer terminates its retail relationship with Bell Atlantic.[4] In its April 10, 1998 response to CTC's complaint, Bell Atlantic's argued that 35-A M.R.S.A. § 309(1) (the "filed rate" doctrine) prohibits it from charging a lesser charge than is prescribed by its tariffs. Bell Atlantic also argued that if it did not enforce the termination provisions, it would be providing discounts for some customers (those subject to the unenforced termination provisions), but not others (those who had never been subject to a termination provision), and that such pricing would constitute undue and unjust discrimination in violation of 35-A M.R.S.A. § 702(1).[5]

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[4]Prior to January of 1998, Bell Atlantic apparently did not enforce the termination provisions when retail customers assigned their retail obligations to CTC and other resellers. Bell Atlantic changed its policy at that time. The parties have filed a considerable amount of testimony about the circumstances of that change in policy, including contemporaneous discussions, alleged representations and the extent to which Bell Atlantic did or did not give notice of its change in policy. All of this testimony is irrelevant. The issue in this case is the lawfulness of Bell Atlantic's present policy of enforcing the provisions.

[5]Bell Atlantic did not include these arguments in either of its briefs.

Bell Atlantic states that CTC "is entitled to purchase from BA-ME at wholesale any volume and term offering BA-ME makes available at retail (either by tariff or by special contract) under similar terms and conditions, reflecting both the retail discount from the month-to-month recurring charges, as well as the wholesale discount" that is required by the TelAct, 47 U.S.C. § 251(c)(3)(A). Thus, CTC and other resellers are entitled to purchase a service subject to the same volume and term commitments, discounts, and the same termination liability provisions as apply to a retail customer, and also receive a wholesale discount. Bell Atlantic apparently claims, however, that a wholesale customer such as CTC must purchase a retail service on the same basis as a new retail customer, i.e., subject to the full term and volume commitments and termination liability provisions that would apply to a new retail customer. Bell Atlantic apparently does not agree that a partially-used contractual arrangement for service is a service that is available at retail, or that a reseller may purchase such a service.

CTC will not realize any immediate direct financial gain and Bell Atlantic will not incur any immediate financial loss as a result of the proposed assignments; this fact explains much about what is, and is not, at stake in this proceeding and about the motives of the parties. Following an assignment, CTC would be subject to all of the obligations of the original retail customer, including the termination liability provisions. CTC in turn would sell the same service to the original Bell Atlantic retail customer.[6] Assuming that CTC did not, or, because of market conditions, effectively could not charge higher rates to the retail customer

[6]As a telephone utility that sets its own rates, terms and conditions, CTC presumably may sell the services it acquires pursuant through assignment to any customer at any rate and terms and conditions it can sustain in the market. It is clear, however, both from its complaint, ¶¶ 11-16 and its initial brief at 6, that CTC intends to sell the services it purchases to the very same retail customer that would assign its contract to CTC.

than had Bell Atlantic, CTC will make no profit on the transaction. CTC has made clear that it expects to pay the full rate that the retail customer had paid to BA-ME; it has not demanded the wholesale discount that applies under 47 U.S.C. § 252(c)(4)(A) (TelAct) when a reseller purchases a service. Similarly, Bell Atlantic will not lose money on the immediate transaction; it will receive the same amount from CTC as it does from the original retail customer. As explained in greater detail below, the parties have another motive for contesting the claimed right of assignment: both believe there is value to obtaining or maintaining the retail relationship with the customer.

We consider each of CTC's claims below.

IV. CTC'S RESALE CLAIM UNDER THE TELACT

CTC argues that the Telecommunications Act of 1996 grants it the right to resell services that are the subject of the existing contracts between Bell Atlantic and its retail customers. Under 47 U.S.C. § 251(c)(4), entitled "Resale," all incumbent local exchange carriers have "the duty":

> A. to offer for resale at wholesale rates any telecommunications service that the carrier provides *at retail* to subscribers who are not telecommunications carriers; and
>
> B. not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service . . .

(emphasis added). The basis for CTC's claim under this provision of the TelAct is not entirely clear. CTC apparently argues that this provision requiring *resale* means that a retail customer has the right to *assign its contract* to a wholesale customer, because the wholesale customer would then sell it to a retail customer. CTC apparently argues that prohibiting such an assignment, or enforcing termination provisions against retail customers who assign a contract to a reseller, constitutes an "unreasonable limitation on the resale" of a telecommunications service.

Before complaining of "unreasonable restrictions" on a right to resale, however, CTC must first establish the right, under 47 U.S.C. § 251(c)(4), to resell the service. That right depends on whether the TelAct requires the service to be available for resale, which in turn depends on whether the service is available *at retail.*

We find that Bell Atlantic does not sell partially-completed contractual arrangements with specific customers at retail, i.e., to other retail customers. Section 251(c)(4) requires that ILEC services that are available *at retail* also be made available for resale. Partially-completed contracts with specific customers are not available to other retail customers. Bell Atlantic therefore has no obligation under the TelAct to make them available for resale.

If such services were available at retail, a retail customer could obtain the discounts that are applicable to three-year commitment by purchasing a contract that had only one year (or any lesser amount of time the customer chose) left, effectively emasculating the tiered discount system that provides greater discounts for longer term or greater volume commitments.

If CTC were permitted to "purchase" partially-used contracts or contractual arrangements (or effectively do so through the device of assignment by Bell Atlantic's retail customers), it would take over the contracts, subject to the rates, terms and conditions as they existed on the take-over date, with the same effect as if a retail customer were able to purchase such a service.[7]

CTC is not, of course, proposing that it would purchase "partially-used" contracts directly from Bell Atlantic. Instead, a Bell Atlantic retail customer would assign its contractual rights to CTC; pursuant to the assignment CTC would become the customer of Bell Atlantic. CTC would sell the rights it acquired from the customer to the same customer. CTC would be selling the contractual *rights* it has acquired, as they then exist, and not a *service* it has directly obtained from Bell Atlantic. The distinction is important; another customer's contractual right to a service, that is subject to a partially-run minimum commitment, is not the same as the service itself. As we found above, it is not a service Bell Atlantic sells at retail.[8]

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[7]As we stated in the Order Addressing Jurisdictional Issues (May 18, 1998), and as noted at the end of Part II of this Order, this proceeding will not address the merits of arguments that this Commission should rule that termination provisions are invalid and should abrogate them. We are considering such issues in the inquiry cited in Part II. We note that the issue in the Inquiry is somewhat broader than that addressed here. In the Inquiry, the proponents of "fresh start" propose that the Commission should abrogate termination liability provisions. Under the assignments proposed by CTC, the termination liability provisions would remain in effect against the assignee wholesale customer (CTC), which would have some incentive to reimpose them on the assignor retail customer.

[8]It is questionable whether CTC is *re*selling anything at all. The evidence suggests it acquires the customer's rights without payment to the customer (but perhaps with consideration consisting of a promise to sell the contractual rights back to the customer). If so, CTC would be selling, not reselling, the contractual rights it acquired from the customer.

In addition, the sale (or resale) is at a secondary level because CTC would be selling what it acquired from the customer rather than from the ILEC. It is entirely possible that TelAct section 251(c)(4)(B), prohibiting ILECs from prohibiting or unreasonably limiting resale, will be construed liberally to apply to secondary resales. However, as discussed above, the provision does not apply to the proposed transaction in this case because CTC is not selling or reselling an ILEC retail product.

We find that the specific services (partially-used retail contracts) that CTC seeks to resell are not available as an offering by Bell Atlantic to retail customers. 47 U.S.C. § 251(c)(4)(A) therefore does not require Bell Atlantic to sell partially-used retail contracts to resellers. Similarly, section 251(c)(4)(B), which prohibits unreasonable restrictions on the right to resale stated in section 251(c)(4)(A), does not apply because no right of resale exists. Accordingly, a Bell Atlantic action that prohibits or inhibits a sale of rights that CTC may acquire by assignment, such as enforcement of its contractual termination provisions with its retail customers, does not constitute a prohibition or an "unreasonable . . . condition or limitation on . . . resale" within the meaning of 47 U.S.C. § 251(c)(4)(B).

We are aware that the New York Public Service Commission (NYPSC) recently ruled that Bell Atlantic's enforcement of contractual and tariff termination liability provisions violated the provisions of 47 U.S.C. § 251(c)(4). *Complaint and Request of CTC Communications, Inc. for emergency relief against New York Telephone d/b/a Bell Atlantic-New York for violations of sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, section 91 of the N.Y. Pub. Serv. Law, and Resale Tariff PSC No. 915*, Case 98-C-0426, Order Granting Petition, (NYPSC September 14, 1998). The New York Commission apparently assumed, without discussion, that bell Atlantic's contractual arrangements with specific customers are services it offers at retail and that they are therefore subject to the resale provisions of the TelAct. For the reasons explained above, we disagree.

V. CTC'S CLAIM THAT THE CTC-BA RESALE AGREEMENT PERMITS ASSIGNMENT

CTC argues that a provision in the Resale Agreement between CTC and Bell Atlantic permits assignment of contracts by BA-ME retail customers to CTC. The Resale Agreement incorporates an Attachment A, which consists of terms and conditions. CTC argues that section 6.3.1.1(B) of those terms and conditions permits a Bell Atlantic retail customer to assign a contract to CTC.[9] Section 6.3.1.1(B) states:

> *If the reseller assumes the account of an existing Telephone Company end user at the end user's existing premises,* the order must identify the end user's billing telephone number and line(s) and indicate that *the end user's existing service . . . is to be transferred to the reseller.*
>
> (1) Authorization to Assume an Account - A reseller placing an order under which it will assume the account of an existing Telephone Company end user customer, or the account of an existing end user customer of another reseller, must obtain appropriate authorization from that end user for the change of service provider . . . .

(emphasis added). CTC argues, correctly, that the provision *anticipates* that a reseller might "assume" the account of an existing Bell Atlantic retail customer. CTC apparently argues that the provision creates a right for retail customers to *assign* their contractual rights to a reseller, without enforcement by Bell Atlantic of termination liability provisions, or a right for resellers to assume those accounts.

The provision says nothing, however, about the circumstances under which an "assumption" of an account might occur. The provision on its face does not expressly create any right for a reseller to assume a Bell Atlantic account. In particular, it does not expressly

[9]The resale agreement between Bell Atlantic and a *reseller* is a different contract than the contracts or contractual arrangements between Bell Atlantic and its *retail customers*. In this Part V we consider rights that may exist under the resale agreements. In later parts of this Order we consider the effect of provisions in BA-ME's retail contracts and tariff on the right of BA retail customers to assign their contracts to CTC.

create a right for a Bell Atlantic customer to assign its contractual rights and obligations to a reseller. At best, as CTC argues, the provision *anticipates* that resellers may assume retail accounts.

It is reasonable to assume that the provision would not exist if there were not some circumstances under which resellers might assume Bell Atlantic retail contracts. It does not necessarily follow, however, that the provision anticipates or creates the particular right argued by CTC if it could apply to other circumstances under which a reseller may unquestionably assume an account of a Bell Atlantic retail customer.[10]

Because there are such circumstances, we cannot conclude that the provision is included for the purpose argued by CTC. There are at least three circumstances under which an account might be "assumed" that do not involve the right of a retail customer to assign a contract to CTC without being subject to termination liability provisions.[11] First, a Bell Atlantic customer who is not and never was subject to termination provisions might decide to transfer its service to a reseller. Second, a customer whose term commitment and termination provisions have expired might decide to transfer its service and account to a reseller. Third, a customer who is subject to a termination provision might pay the termination charges and transfer its service and account to a reseller.

All of these possibilities are consistent with the argument in Jack H. White's rebuttal testimony for BA-ME at 11-12, and in BA-ME's Brief, that "assume" should be considered to

[10] A "right" means that a person may take some action without restriction or over the objection of another person.

[11] The fact that the provision in question, located in the wholesale contract between CTC and BA-ME, anticipates an "assumption" of an "account" by CTC, rather than an "assignment" of a "contract" by a BA-ME retail customer to CTC, makes the possibility argued for by CTC even more remote.

be synonymous with "taking over" or "winning over" a retail account, or with the customer's "changing" or "migrating" to a reseller, but that, as stated in the "assumption" provision itself, the reseller "must be certain it has obtained a *proper* customer authorization to [assume the account]" (emphasis added). Mr. White also argues that Section 6.4.2.1 of the Resale Agreement is inconsistent with any claimed right to assume a retail contract without the customer incurring termination liability. Section 6.4.2.1 states:

> Should a Telephone Company end user *discontinue service* in order to *become an end user of a reseller*, the Telephone Company will render a *final bill* to such end user. *Balances* and/or credits in a Telephone end user's account *will not be carried over* to the resellers [sic] account with the Telephone Company.

(emphasis added). Mr. White argues, and we agree, that this provision makes clear that a decision by a customer to transfer its service to a reseller constitutes a "discontinuance" or termination of service. The provision does not expressly refer to termination liability provisions, although a "final bill" will be rendered. Nevertheless, it appears obvious that upon "discontinuance", defined in the provision itself as becoming "an end user of a reseller," termination liability provisions would apply.

CTC argues that the anticipation in the resale contract that resellers might assume the accounts of Bell Atlantic's customers creates, by implication, a right to do so over Bell Atlantic's objection and a right by the customer to assign its contractual rights without incurring termination liability. Its argument would be far more plausible if there were no circumstances under which a reseller might assume a retail account other than the specific one argued by CTC. Because there are such circumstances, it is not necessary to search for a circumstance to fill what otherwise might be a void. CTC must therefore establish the right it claims by some means that is independent of the provision in its resale contract with BA-ME that refers to the assumption of retail customer accounts by resellers.

We are aware that the New Hampshire Public Utilities Commission recently ruled that the "anticipation of assumption" clause that anticipates an assumption of BA-NH retail contracts contained in the resale contracts between CTC and BA-NH permit BA-NH retail customers to assign their contractual rights to CTC. *See CTC Communications Corporation, Petition to Require Assignments of Contracts,* Docket No. DE 98-061, Order Permitting Assignment of Certain Contracts, (NHPUC October 7, 1998). The New Hampshire Commission did not consider whether the Resale Agreement provision could have been referring to assumptions of retail contracts under circumstances other than the particular right argued by CTC. Thus, the New Hampshire Commission, like CTC, apparently assumed that the reference to assumptions of accounts anticipates or creates the specific right argued by CTC. For the reasons set forth here, we disagree with the New Hampshire PUC's ruling.

VI. BELL ATLANTIC'S CLAIM THAT ASSIGNMENT IS PROHIBITED BY THE PROVISIONS ADDRESSING ASSIGNMENT IN ITS TARIFF AND SPECIAL CONTRACTS

Various Bell Atlantic services provided in its rate schedule (tariff) are subject to the following provision (or substantively identical variants):

> With the written permission of the telephone company, the obligation to pay the . . . rates for the remainder of [the applicable service] may be assigned to *another customer at the same location* . . . A Service and Equipment charge . . . for transfer of service, payable by the new customer, applies for this change. A transfer of service between customers at the same time as a relocation is not permitted. (emphasis added)

See, e.g., Bell Atlantic schedule of rates, terms and conditions, Part A, § 1.8.3.E (Centrex two tier plan); Part A, § 1.8.4.I (Variable Term Payment Plan applicable to several services).[12] Similar provisions are contained in contracts for retail service between BA-ME and retail customers.

Bell Atlantic argues that these provisions prohibit assignments by retail customers, including the specific assignment that CTC seeks, i.e., from a *retail* customer to a *wholesale* customer, unless Bell Atlantic grants its written permission. CTC argues that the provisions do not apply because there is no "transfer of service." According to CTC,

> the end user remains. A new entity, a reseller, enters the mix between BA-ME and the end user . . . . No service is transferred from the end user to CTC. Instead, service is purchased from BA-ME and then sold to the same end user.

CTC thus argues, somewhat incongruously, that retail customers have a right to *assign* their *contracts* for retail service, but that there is no *transfer of service* because the same retail customer "remains," albeit as a retail customer of CTC rather than of Bell Atlantic. We do

[12]The last sentence of the quoted provision is not included in the BA-ME tariff, Part A, § 3.8.3, applicable to two-tier rate plans.

not find CTC's argument convincing. We have little doubt that the common sense meaning of a "transfer of service" at least encompasses a change in the entity that is paying Bell Atlantic for the service and that has the right to use the service; an assignment accomplishes exactly that result.[13]

On the other hand, we are also not wholly convinced that these provisions were ever intended or designed to apply to address possible transfers of service from a retail customer to a wholesale customer. The phrase "another customer *at the same location*" (emphasis added) strongly suggests that the authors of these provisions contemplated applicability only to another *retail* customer at the same location. The phrase is not likely to apply to a wholesale customer, which, if it has a "location" at all, the location is not likely to coincide with some customer's (e.g., an assignor's) retail location. A non-facilities-based reseller has no wholesale "location." A facilities-based wholesale customer may have a wholesale location, such as a point-of-presence (POP) at which it "takes service" (receives and delivers calls to another carrier).[14]

We are left with the overall impression that the quoted assignment provisions were intended to address assignments between two retail customers and were never intended to address the possibility of an assignment by a retail customer to a wholesale customer in its role as a wholesale customer/reseller.

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[13]*See also* discussion in Part VII.D below concerning whether assignment constitutes "termination" for termination liability purposes.

[14]Any wholesale customer might also have a location, e.g., an office, at which it takes *retail* service; on rare occasions a reseller might actually take over service at the same location as a retail customer of an another carrier who assigned its rights to the reseller. However, in that event, the provision would clearly apply. The fact that the retail assignee in such an instance also happened to be a wholesale customer would be incidental.

Assuming that the provisions addressing assignment have no applicability to an assignment from a retail customer to a wholesale customer, what is the effect of Bell Atlantic's failure to address that circumstance specifically? The general rule, reflected in the Restatement (Second) of Contracts § 317, is that contracts are freely assignable in the absence of a recognized exception to that rule, including a provision in the contract that prohibits an assignment. If the Bell Atlantic's contractual and tariff assignments-restriction provisions do not address assignments from a retail to a wholesale customer, then arguably there is no contractual provision that prohibits such an assignment. In addition, when faced with possible ambiguity or omission in a tariff or contract, we have ruled that the ambiguity or omission will be construed against the drafter. *See Nevius v. Bangor Hydro-Electric Company,* C.A.D. No. 23005, Order Opening Investigation and Reversing Ruling of Consumer Assistance Division (August 8, 1997); *St. Joseph's College v. New England Telephone and Telegraph Company d/b/a Bell Atlantic,* Docket No. 98-792, Order November 24, 1998).

It is also possible to argue, however, that applying such a rule under the present circumstances is not appropriate. When the provisions were drafted, it may not have been reasonable to anticipate attempted assignments by retail customers to resellers, the provisions at least arguably prohibit assignments to wholesale customers anyway, and it seems unlikely that Bell Atlantic would have any reason to be more permissive about an assignment to a wholesale customer than to a retail customer.[15]

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[15]CTC argues, however, that Bell Atlantic would be more likely to restrict assignments to *retail* customers:

> there are valid reasons for BA-ME to require [a transfer from a retail customer to another retail customer to] be conditioned upon

The provisions governing assignment are structured in such a way that silence on the matter of assignments by retail customers does not necessarily have the effect of permitting assignments in all other circumstances. The wording of the provisions *permits* a retail customer to assign its contractual rights, but only under limited circumstances: BA-ME's written permission must be obtained and the conditional right to assign exists only when the new retail customer is "at the same location." Because express permission is granted only in very limited circumstances, it is arguable that BA-ME's contracts and tariff do not permit assignment in other circumstances. Indeed, Bell Atlantic argues the tariff provisions "plainly restrict the right to assign the benefits and obligations of the long-term service arrangements to instances where BA-ME has agreed in writing and only to an assignment to 'another customer.'" Conversely, if the provisions had been phrased as outright prohibitions, it would be more logical to find by implication that in all other circumstances there is no prohibition against assignment.

Because we decide below that one or more of the exceptions to the general rule of assignability do not permit an assignment under the circumstances of this case, we do not need to decide whether the assignment provisions in Bell Atlantic's retail contracts and tariff apply to an assignment by a retail customer to a wholesale customer. We also do not need

> its consent. The new end-user's credit, financial stability and ability to pay its bills might differ from the previous end-user's.

It is not clear that assignment to a wholesale customer is less risky. The assignee (wholesale customer) might present a greater or a lesser credit risk than the original retail customer. CTC states that the end-user customer would remain liable on the contract but has provided no proof of this assertion. Moreover, although under CTC's scenario the retail customer would remain the same, nothing would appear to preclude a wholesale customer from reselling the service to anyone at any location.

to decide whether the granting of permission under narrow circumstances implies a prohibition in all other circumstances.

VII. GENERAL CONTRACT LAW; EXCEPTIONS TO THE GENERAL RULE OF ASSIGNABILITY

A. Introduction

In addition to its claim that the "assumption" provision of the Resale Agreement allows Bell Atlantic retail customers to assign their contracts to CTC, a claim we have rejected in Part V, CTC claims that general contract law permits such an assignment. To support its claim, CTC relies primarily on § 317 of the Restatement (Second) of Contracts Second. Section 317 states:

> **§ 317.** Assignment of a Right
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> (1) An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor extinguished in whole or in part and the assignee acquires a right to such performance.
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> (2) A contractual right can be assigned unless
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> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.

We are concerned here with the exceptions to the general rule that a party to a contract may assign a right under the contract to another party, particularly those described in subsection 2(a) of Restatement section 317. We have already considered the exception listed in section 2(c) in Part VI of this Order. Because we decide that at least one of the exceptions in subsection 2(a) applies, we do not address the "public policy" exception described in subsection 2(b).

In relying on and applying the language of the Restatement, we are using a secondary legal source, albeit an authoritative one. Its authors have *restated* what they perceive to be the law on a subject. Statutes and court decisions are primary legal authority; one reason for our reliance on the Restatement is the fact that the parties and we have been able to find little primary authority that directly addresses the issue in this case.

B. Factual Finding

Central to consideration of each of the three exceptions contained in subsection 2(a) is Bell Atlantic's claim that it loses a substantial portion of the value of the contract if a retail customer is replaced by a wholesale customer. Dr. Kenneth Gordon testified for Bell Atlantic that one of the benefits that Bell Atlantic expects to obtain and retain in exchange for discounted retail rates is a long-term retail customer relationship with the retail customer. Termination liability provisions apply if the customer terminates its service prior to the end of the agreed term. According to Dr. Gordon, if the customer terminates early, a termination liability charge compensates Bell Atlantic for the granting of the discount, which is granted in exchange for the customer's agreement to a long-term commitment. It also compensates Bell Atlantic for any investment the company may have made on behalf of a customer, but that it may not recover in the discounted rates over a shorter period than the agreed term. Finally, termination liability provisions act to ensure a continued direct retail customer relationship. According to Dr. Gordon and Kevin Byrnes, another Bell Atlantic witness, maintaining the retail relationship is important because a retail provider has the opportunity to sell additional services to the customer during the term of the contract, as well as extended services after the expiration of the term commitment.

We accept as fact Bell Atlantic's claim about the value of retail relationships. Bell Atlantic's witnesses' testimony is unrebutted. CTC witness Dr. Gregory Rosston states that some customers may never purchase additional services, and that the profit from additional sales must exceed the revenue loss BA-ME incurs because of the discounts. It is also likely that there is little or no value in a retail relationship with a customer who wants to leave Bell Atlantic, but who resents the termination liability provisions and believes it is a "captive" because of them. Those observations do not rebut the fact that other customer relationships may have value beyond the value of the revenue under the contract itself. More importantly, they do not address the obvious assumption by both parties that the retail relationships in aggregate exceed the value of replacement wholesale relationships. The actions and positions of the parties in this case fully confirm the aggregate value of Bell Atlantic's retail relationships. At stake in this case is who gets to enjoy the retail relationship with Bell Atlantic's retail customers. As described above, if a retail customer assigns its contractual rights to CTC, Bell Atlantic loses no money on the assigned service itself: CTC must pay Bell Atlantic the same amount the retail customer paid. Similarly, CTC can make no money on the assignment, assuming that it does not charge the customer higher rates than did Bell Atlantic. Plainly, the retail relationship --- the opportunity to market to a carrier's own retail customer --- is the only aspect of the contractual relationships that is of value in this dispute.

We turn now to consideration of the exceptions described in subsection 2(a) of Restatement section 317. In our discussions below, we often use the terminology used by the Restatement section: the assignor is the retail customer, the assignee is the CTC (or another wholesale customer) and the obligor is Bell Atlantic.

C. First Exception: Materially Change the Duty of the Obligor or Materially Increase the Burden or Risk Imposed on the Obligor by the Contract

We consider two clauses, "materially change the duty . . ." and "materially increase the burden or risk . . . ," together because of their similarity. Bell Atlantic argues that its duties are materially changed and the burdens and its risks would be materially increased if retail customers were permitted to assign their contractual rights and obligations to wholesalers such as CTC. CTC argues that, under an assignment from a retail customer to a wholesale customer, Bell Atlantic's duties are essentially unchanged: it must still provide telephone service (the physical connection, transport and switching, etc.) to the end user. Other duties, such as customer service, also change, possibly materially, but, as CTC points out, they may well be lessened. A similar analysis applies to "burdens." There is no reason to find they would increase substantially because of the changeover from a retail customer to a wholesale customer.

The question of whether Bell Atlantic's risks have increased is more difficult to answer. We assume that the Restatement refers at least to such matters as an increase in the financial risk that might result if the assignee would be less likely to pay than the assignor. It is not possible on this record (or perhaps ever) to make a general finding that the risk of non-payment increases materially because retail customers are replaced by wholesale customers.[16]

Bell Atlantic argues that its risks are increased because, by losing the direct retail customer relationship, it has lost the valuable opportunity to market other services or service extensions to the customer. BA-ME apparently relies on this opportunity both as a potential source of revenue and to mitigate whatever risk (if any) that may exist under the discounted pricing of the contract. Even if the potential loss of this revenue and the opportunity to mitigate risk increase the risk that occurs as an *incident* of the contractual relationship, it is not clear that this increase constitutes an increase to the “risk *imposed . . . by* [the] contract” (in the words of the Restatement; emphasis added). We do not decide this issue because we find that another exception in the Restatement section does apply to the circumstances of this case.

D. <u>Second Exception: Materially Impair the Obligor’s Chance of Obtaining Return Performance or Materially Reduce Its Value</u>

The second exception stated in subsection 2(a) of Restatement section 317 to the general rule of assignability is that an assignment is not permitted if it will “materially impair his [the obligor's; i.e., Bell Atlantic's] chance of obtaining return performance, or materially reduce its value to him . . . .” Neither party quoted or provided briefing on that

[16]CTC states that the risk is diminished, not increased, in part because both the retail customer (the assignor) and the wholesale customer (the assignee) would remain liable to Bell Atlantic for payment. As noted above in Part IV (in connection with BA-ME’s contract and tariff provisions that address assignments to another customer “in the same location”), CTC offers no support to this proposition.

portion of subsection 2(a) in their main briefs. Accordingly, the Hearing Examiner requested parties to provide further briefing on this issue.[17]

We must consider what is meant by "return performance." For the assignments at issue in this case, the most obvious "return performance" is the retail customer's obligation to pay Bell Atlantic for the services provided by Bell Atlantic. As we discussed in our analysis of risk above, we cannot conclude the chance of that payment is necessarily impaired by assignments from retail customers to wholesale customers. Any such impairment might be better assessed on a case-by-case basis. In addition, assuming the return performance (payment) is made by either the assignor or the assignee, its *value* would not be diminished by an assignment (a dollar is a dollar). Therefore, the reference in the Restatement to the *value* of "return performance" suggests that "return performance" encompasses more than payment. For example, the term may apply to a contract for personal services. Thus, an assignment might be prohibited if the assignee does not possess the same expertise as the assignor.

In its brief addressing this issue, Bell Atlantic argued that the "return performance" included in its contractual relationships with retail customers consists of not only payment, but also the promise to maintain a retail customer relationship with Bell Atlantic for a stated period. The contractual consideration for that promise is a discount from

[17]The briefing order requested the parties to provide any case law interpreting this provisions and, more broadly, with or without reference to the Restatement, whether any case law had addressed the issue of whether a contract can be assigned if, by virtue of the assignment, the benefits of the contract to the obligor were substantially diminished. Other than one case provided by Bell Atlantic, the parties provided little in the way of helpful cases, but they did provide helpful arguments based on the language of the Restatement exception itself.

rates that would otherwise apply. Termination liability provisions apply if the customer does not keep the promise.

Bell Atlantic's reasoning is sound. A retail customer has only one specific obligation beyond paying for the services rendered; although it has no obligation to listen to or respond to marketing efforts, it has agreed contractually to maintain the retail customer relationship for the period stated in the contractual relationship. If a retail customer may assign the retail contract to a *wholesale* customer, the retail relationship aspect of the customer's return performance is terminated. As we found above, both parties' actions and positions taken in this case clearly establish that the retail relationship has greater value than a wholesale relationship. A wholesale relationship is not a reasonable substitution for the retail relationship.[18] Termination of the relationship therefore eliminates a significant portion of the return performance that is due from the retail customer to the obligor (Bell Atlantic) and materially reduces the value of the return performance.

Because we rule that an assignment is not permitted under general contract law, we conclude that an assignment by a retail customer to a wholesale customer constitutes a termination of the customer's retail relationship with Bell Atlantic, and that it is a termination of service within the meaning of the termination liability provisions in BA-ME's contract and tariff. Our conclusion is a legal one, but it is also fully supported factually. Bell Atlantic witness White's unrebutted testimony states:

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[18] This analysis suggests that it might be permissible under the Restatement principles for one retail customer to assign a contract to another retail customer, absent a prohibition by contract. As discussed in Part VI, however, Bell Atlantic's contracts and terms and conditions contain provisions that appear to apply at least to assignments to a retail customer; they allow an assignment by one customer to another at the same location, but only with Bell Atlantic's written consent.

> When an end user has a direct retail contract relationship with Bell Atlantic, Bell Atlantic is contractually responsible to that end user for all aspects of the service arrangement. Bell Atlantic will take trouble reports from the end user, answer customer inquiries about billing matters, provide direct technical support, and provide other forms of customer care. When the end user is dealing with a reseller, it must look to the reseller for all these things. *Bell Atlantic no longer has any contract with the end user.*

(emphasis added).

We are aware that the New York and New Hampshire decisions cited above both found that an assignment by a retail customer to a wholesale customer does not constitute "termination" by the retail customer, for purposes of the termination liability provisions. The New York Commission stated, without further discussion, that "BA-NY customers are not terminating or cancelling their CSA [Customer Service Arrangement] agreements; they are assigning them to CTC." The New Hampshire Commission, also without discussion, stated "Bell Atlantic's customers are not terminating or cancelling their agreements with Bell Atlantic: they are assigning them to CTC." Neither Commission provides any reason for its conclusion that an assignment does not constitute termination of the customer's contract. Neither Commission considered questions such as the value of the retail relationship, and whether termination of that relationship would constitute a breach of the retail customer's return performance. For the reasons stated in this Part, we respectfully disagree with the decisions of both the New York and New Hampshire commissions.

We are also aware of a recent recommended ruling by the U.S. Magistrate for the U.S. District Court for the District of Maine that reaches the same conclusion as that of the New York and New Hampshire Commissions. *CTC Communications Corp. v. Bell Atlantic Corporation*, U.S. District, D.Me, Docket No. 97-395-P-C, Recommended Decision in

Defendant's Motion for Summary Judgment (Nov. 19, 1998). The recommended decision addresses CTC's anti-trust claim on a Motion for Summary Judgment by defendant Bell Atlantic. In considering Bell Atlantic's claim that summary judgment should be granted on the ground that its actions were exempt because of the state action doctrine, the Magistrate proposed a ruling that the Bell Atlantic termination clauses did not apply if a retail customer assigned its contractual rights to a wholesale customer. The Magistrate relied in part on the fact that the retail customer was still taking the same service and that Bell Atlantic would continue to receive approximately the same amount of money. We have addressed both of those considerations and have found that they are outweighed by the fact that an assignment to a wholesale customer deprives Bell Atlantic of the valued retail relationship.[19]

The Magistrate, like the New York and New Hampshire commissions, did not address the value of the retail relationship and whether termination of that relationship would constitute a breach of the retail customer's return obligation to Bell Atlantic.

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[19]The Magistrate also relied on the fact that Bell Atlantic did not enforce termination liability provisions against such assignments prior to January of 1998 and changed its policy without state regulatory approval. This latter basis for the ruling would appear to be case specific to the anti-trust claim and the state action defense.

For this investigation, we see little significance, if any, in the fact that NYNEX, prior to and for some months after its merger with Bell Atlantic, did not enforce the termination liability provisions when retail customers assigned their contracts to wholesale customers. A utility is, of course, under an obligation to enforce the provisions of its tariff and contracts. *See* 35-A M.R.S.A. § 309. The termination liability provisions, however, are subject to interpretation, as indicated by our decision, the other decisions and recommended decision discussed above, and by the fact, prior to the NYNEX-Bell Atlantic merger, that NYNEX did not enforce the provisions, while pre-merger Bell Atlantic did.

VIII. OTHER CONSIDERATIONS

Thus far, we have considered the arguments of the parties and attempted to analyze whether retail customers have the right to assign a retail contractual right to a wholesale customer using the language of the Restatement (Second) of Contracts § 317. We have addressed, in particular, two exceptions stated in section 317 to the general rule that contracts are assignable. As discussed in Part VII above, the Restatement, while authoritative, is a secondary source and a *restatement* of what its authors perceive to be the law on the subject. We have found that one of those exceptions reasonably applies to the situation in this case and that it prohibits assignment by a retail customer to a wholesale customer.

This mode of analysis is useful and even necessary in this case because neither the parties nor we have been able to find cases that clearly address a situation such as the one in this case. Nevertheless, we are concerned that this approach may overlook a larger picture. We have found that the assignments that CTC claims retail customers have a right to make would deprive Bell Atlantic of much of the value of its contract with retail customers. Only one of the specific exceptions contained in Restatement section 317 directly addresses a reduction in value, and that as an incident to "return performance" by the assignor. Each of the specific events that are listed as exceptions to assignability, e.g., a material change in the duty of the obligor or of an increase to the obligor's risks, will almost certainly result in a diminution of the value of the contract. However, the Restatement does not state a more general principle that assignment is not permitted if it is likely to result in a material reduction in the value of the contract to the obligor. It is possible that such a general principle may exist in the law, and the Restatement may not have stated it yet. (The present Restatement

(Second) of Contracts was published in 1981). It is not a central function of a public utilities commission to develop contract law, although circumstances may place us in the position of having to decide what may be novel contract law questions. Nevertheless, based on our experience in this case, the more general principle discussed above is one that could be derived from the specific events and instances of harm that the law (at least as reflected in the Restatement) does recognize as prohibiting an assignment.

Bell Atlantic makes one further argument that we have not addressed. It argues in its main brief that it is a "fiction" that the retail service has not been terminated, and has been "merely assigned." It argues in its reply brief that the "assignment" proposed by CTC is "pure fiction," that CTC has no intention of "standing in the shoes of the customer;" that, for example, CTC demands wholesale, not retail billing services. While Bell Atlantic does not develop this argument extensively, it apparently is arguing that the transaction is a sham designed primarily so that one competitor can take over a retail customer from another without triggering termination liability provisions. CTC proposes that the Commission should rule that a Bell Atlantic retail customer should be able to assign its contractual rights and obligations (including the termination provisions) to CTC. Under that ruling, CTC would not use the service it obtained under the assignment as an end-user, but would instead sell the service, as a replacement retail provider, to Bell Atlantic's original retail customer. In a typical assignment, the assignor no longer has any rights or obligations under the contract; the assignee is substituted for the assignor. Here, however, the assignor will receive the same telephone service as it did prior to the assignment, except from a different retail provider. As CTC claims (or admits) in its brief, it "enters the mix between BA-ME and the end user," i.e., it interposes itself between the original retail customer and the original retail provider.

The end result of these transactions is that the retail customer remains as the retail customer, as if it had "assigned" nothing at all (or alternatively, has "assigned" its retail rights to itself), and CTC has displaced Bell Atlantic as the retail provider, as if Bell Atlantic had been forced to assign its rights and obligations to CTC. Plainly, the law does not permit a person who is not a party to a contract (e.g., CTC) to compel one of the parties to the contract (e.g., Bell Atlantic) to assign its rights and obligations to the non-party (e.g. CTC); yet that is essentially the ultimate effect of accepting CTC's arguments. Bell Atlantic is left with a wholesale customer, but loses the potential advantages, clearly recognized and desired by both parties, that are associated with a retail customer relationship.

Because we have found that an assignment by a retail customer to a wholesale customer is a breach of a portion of the retail customer's "return obligation," it is not necessary for us to find also that such an assignment is also a "fiction" or "sham." Nevertheless, the breach of the customer's obligation to remain as Bell Atlantic's retail customer, and the displacement of Bell Atlantic as the retail provider (while the assigning retail customer continues to receive the same underlying service from another provider), are two facets of the same event.

IX. CONCLUSION

We rule that there is no legal right for Bell Atlantic's retail customers to assign their retail contractual rights and obligations with Bell Atlantic to a wholesale customer without being subject to contractual termination liability provisions. We rule further that such an assignment constitutes a "termination" of the contract pursuant to the termination liability provisions included in Bell Atlantic customer contracts and Bell Atlantic's tariff. Accordingly, Bell Atlantic may therefore enforce the termination provisions contained in its contracts with customers and in its tariff if a retail customer assigns its contractual rights to CTC.

In support of those rulings, we find that a retail relationship with a customer, as opposed to a wholesale relationship, generally has a substantially greater value to a telephone utility because of the potential for additional current and future sales to the retail customer through marketing efforts. Accordingly, we rule that maintaining a retail relationship with Bell Atlantic is part of the "return performance" (within the meaning of Restatement (Second) of Contracts § 317(2)(a)) that is contractually required from the obligee (the retail customer) under contracts and contractual arrangements between retail customers and Bell Atlantic that include minimum term commitments. We rule further that an assignment of such a contractual arrangement to a wholesale customer is a breach of the retail customer's return performance.

Dated: December 9, 1998

Respectfully Submitted,

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Peter G. Ballou
Hearing Examiner